STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

RONNIE DANCER and
ANNETTE DANCER,

Plaintiffs-Appellees,

-vs-

Docket No. 153830
COA Docket No. 324314
Kalamazoo Docket No. 12-0571-NO

CLARK CONSTRUCTION COMPANY, INC. a Michigan corporation, and BETTER BUILT CONSTRUCTION SERVICES, INC., a foreign Corporation,

Defendants-Appellants.

DEFENDANT-APPELLANT CLARK CONSTRUCTION COMPANY INC.'S BRIEF FOR THE ORDERED MINI-ORAL ARGUMENT ON THE APPLICATION

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Plaintiff Presented Sufficient Evidence to Establish Genuine Issues of Material Fact With Regard to The Common Work Area Doctrine's Third Element of a Danger Creating a High Degree of Risk to a Significant Number of Workmen?

II. Whether Plaintiff Presented Sufficient Evidence to Establish Genuine Issues of Material Fact With Regard to The Common Work Area Doctrine's Fourth Element of a Common Work Area?

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INTRODUCTION

This matter involves a construction site injury. Plaintiff Ronnie Dancer (Dancer[1]), a masonry worker, fell from a hydro mobile scaffolding when he was raising it by himself without wearing his fall protection. Dancer created the fall hazard by deciding not to wear his available fall protection and then walking on improperly overlapping planking that he moved in order to raise the scaffolding. Dancer was working alone at the time of his fall and was the only person to ever face the risk he created in improperly replacing the planking moments before his fall. Moreover, while other trades had previously used the scaffolding, their use of the scaffolding had ended prior to the fall, leaving only Dancer and his fellow masonry employees to work on the scaffolding for at least a week, which means that no other trade had even the possibility of ever facing this same risk that led to Dancer's fall.

Plaintiffs brought suit in this matter against defendant Better Built Construction Services, Inc. (BBC) the general contractor on the project and defendant Clark Construction Company Inc., which was providing mentoring services to BBC regarding the general contractor work. As a general rule, general contractors are not subject to liability for injuries suffered by employees of subcontractors on construction projects because such employees are properly protected by their direct employer's workers' compensation insurance coverage. The sole issue in this matter is if plaintiffs' suit fits within the narrow common work area doctrine exception to the general rule of general contractor nonliability for injuries to a subcontractor's employees. In order to fit within the common work area doctrine exception, the injured subcontractor employee must show: "(1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that

[1] Dancer's wife, plaintiff Annette Dancer (Annette), brings a derivative claim in this matter. Dancer and Annette will be referred to collectively as plaintiffs when appropriate.

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created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).

Although defendants strongly believe that plaintiffs cannot satisfy any of the elements of the common work area doctrine, this Court has granted Mini-Oral Argument on Clark's application for leave to appeal regarding the third and fourth elements of the common work area doctrine. These two elements cannot possibly be satisfied in this case as Dancer was the only worker that could possibly face the risk of walking across the misplaced planking without his fall protection as Dancer moved the planking while working alone, after making the decision not to wear an available fall harness, and the planking fell with him meaning that no one else would face the danger of the misaligned planking in the future. This Court has made clear that a worker's failure to wear available fall protection cannot satisfy the third element of the common work area doctrine of a danger to a significant number of workers. Moreover, Dancer and his fellow masons were working in isolation from other trade for at least a week meaning that no common work area existed at the time of the fall.

The purpose behind the common work area doctrine is to protect workers in areas of the construction project where their direct employer does not have the authority or ability to eliminate serious hazards in the work area. In areas where multiple trades are working at the same time, the work may fall under the adage that when everyone is in charge, no one is in charge. In such circumstances, because the general contractor oversees the multiple trades, it would be the only party with the ability to properly enforce safety requirements on everyone working in the area. But by imposing liability, as the Court of Appeals majority has done, outside of a common work area and instead in an area where one trade and one worker faced a self-created, limited risk, the Court of Appeals majority has made the general contractor an

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insurer for all risk faced on the construction site at all times. This Court never intended to place such liability on general contractors and it is antithetical to good business in this state. As the dissenting Judge Kurtis T. Wilder stated "[t]he majority's contrary conclusion is a step toward imposing strict liability on general contractors for all hazards on construction sites." *Dancer v Clark Constr Co Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2016 (Docket No. 324314) (Wilder, J., dissenting) (Appendix 1, p 2) The Court of Appeals majority should be reversed.

STATEMENT OF MATERIAL FACTS

I. THE FORT CUSTER PROJECT

This matter arises out of a construction project occurring at the Fort Custer Training Center in Battle Creek, Michigan. (Second Amended Complaint, Appendix 2, ¶¶ 5, 11-12) BBC contracted on December 10, 2009 to work as the general contractor on the project constructing miscellaneous buildings at Fort Custer. (<http://government-contracts.insidegov.com/l/9087598/W912QR10C0017> accessed January 24, 2017) BBC was categorized as a minority owned, small, disadvantaged business for the project. (Fort Custer Project Information, Appendix 3, p 10) Clark worked through a mentoring program with BBC. Clark provided guidance to the smaller business as BBC worked as the general contractor on the project. (Paul Clark Deposition, Appendix 4, p 8)

BBC hired Leidal & Hart Mason Contractor Inc. (Leidal & Hart) to work as the masonry contractor on the project, building the masonry walls of the buildings under construction. (Brad Leidal Deposition, Appendix 5, pp 5-6, 46) Dancer was employed by Liedal & Hart. Liedal & Hart assigned Dancer to the Fort Custer project. (Complaint, Appendix 2, ¶ 11) Dancer was a union mason tender with more than 20 years of experience. Dancer worked at the Fort Custer

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site for about a month prior to the fall at issue in this matter. (Ronnie Dancer Deposition, Appendix 6, pp 13, 17)

II. THE HYDRO MOBILE SCAFFOLDING

As part of its work as the masonry contractor on the Fort Custer project, Liedal & Hart supplied three hydro mobile scaffolding units. Liedal & Hart owned the hydro mobile units used on the Fort Custer project. (Walter Kyewski Deposition, Appendix 7, pp 27-28; Glenn Johnson Deposition, Appendix 8, pp 13-14, 52) The three hydro mobiles were metal bases 24 feet long. They were set up sitting next to each other. (Johnson Dep, Appendix 8, p 14) A photograph depiction of the hydro mobile was entered in the deposition of Liedal & Hart employee Glenn Johnson depicting the setup of the three connected hydro mobile units:

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(Johnson Dep Appendix 8, pp 14-15)

The hydro mobile scaffolding generally had two levels, the work platform and the staging platform. The staging area was where mortar and working materials would be placed. The work platform consisted of planks on which the workers stood and worked. (Cory Hanson Deposition, Appendix 9, pp 85, 187) The planking rested on outrigger supports. (Nick Martin Deposition, Appendix 10, pp 66-67) Nick Martin, Liedal & Hart's foreman, explained that they used 16 foot planks for the work platforms. The planking was rated for scaffoldings use and was owned by Liedal & Hart. These planks were generally not required to be tied down to the outriggers. (Martin Dep, Appendix 10, pp 47-48, 67, 90; Johnson Dep, Appendix 8, p 95) The rules for the proper use of the planking was controlled by OSHA/MIOSHA standards, not the standards set in any particular manual. (Martin Dep, Appendix 10, p 70) Walter Kyewski, Liedal & Hart's safety director, who had been properly trained in OSHA courses on use of hydro mobile scaffolding, testified that tying down the planking at each outrigger would, in fact, create trip hazards. (Kyewski Dep, Appendix 7, pp 5-6, 8, 54)

John Stewart, Senior Safety Officer for MIOSHA, investigated the fall at issue in this case. Stewart saw that planking was used to connect the hydro mobiles to each other. He did not find any MIOSHA violations in the way the scaffolding was set up. (John Stewart Deposition, Appendix 11, pp 4, 13, 28, 40) When asked about standards that may have existed in manuals or contracts and alternative methods of connecting the hydro mobile to each other, Steward indicated that they would not be applicable to the safety standards required by MIOSHA and that MIOSHA would not, and could not, enforce higher standards. (Stewart Dep, Appendix 11, pp 38, 40, 44) Jim Schaibly, a Clark superintendent, testified that overlapping the planking was industry standard. (Jim Schaibly Deposition, Appendix 12, pp 7, 111-113) Tom Destafney

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testified that there was no requirement to use scaffolding bridges for the hydro mobile. (Destafney Deposition, Appendix 22, pp 46-47, 74, 80, 92-93)

In the course of contrasting the building walls, Liedal & Hart would lay a few courses of blocks. They would then raise the hydro mobile up so that it remained at a comfortable height at which the masons could work. Raising the hydro mobile was essentially a one-man job, just requiring starting the engine and pulling a couple of levers to activate the hydraulics. They can be raised with the workers still on the hydro mobile. (Johnson Dep, Appendix 8, p 43) Each hydro mobile unit could be raised individually, but Liedal & Hart attempted to coordinate the raising of all three at one time. (Johnson Dep, Appendix 8, pp 103-104) Normally, raising the hydro mobile did not require moving work platform planking. (Johnson Dep, Appendix 8, pp 43-44)

Liedal & Hart owned, erected, and maintained the hydro mobile. (Kewski Dep, Appendix 7, pp 27-28; Johnson Dep, Appendix 8, p 52) To effectuate its duties regarding the hydro mobile, Liedal & Hart had two competent persons on the project to inspect the scaffolding each day, Nick Martin, the job foreman, and Mike Wiejach, a certified scaffold erector. (Martin Dep, Appendix 10, p 12; Stewart Dep, Appendix 11, p 45) John Stewart of MIOSHA testified that it was not the responsibility of either BBC or Clark to employ a competent person for the project. The responsibility was Liedal & Hart's. (Stewart Dep, Appendix 11, pp 18-21) Liedal & Hart were the experts in masonry work, scaffolding erection, and raising and lowering the hydro mobile. (Jeff Kelly Deposition, Appendix 13, p 134; Clark Dep, Appendix 4, pp 46-47, 50) Liedal & Hart was in complete control of the hydro mobile scaffolding. In fact, Nick Martin, Liedal & Hart's foreman, testified that other trades had to ask permission of Liedal & Hart before they could ever come on the hydro mobile:

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Q (BY MR. DAVIDSON) And if any other trade wanted to use your scaffold they would have to get permission from you?
A Absolutely. [Martin Dep, Appendix 10, p 118.]

Generally, Liedal & Hart were the only contractors to ever use their scaffolding. But Weston Allen of the plumbing contractor testified that the plumbing contractor accessed the hydro mobile at times to put pipes into the walls. (Weston Allen Deposition, Appendix 14, pp 5-6) ***Weston Allen testified, however, that the plumbing would be installed in the walls at lower levels, when the hydro mobile was at 10 to 14 feet***. (Allen Dep, Appendix 14, pp 6, 17-18) They never put any plumbing in above 16 feet. (Allen Dep, Appendix 14, p 27) Moreover, ***Weston Allen testified that the plumbing contractor only used the scaffolding at other locations on the project and never at the location where Dancer fell because there were no pipes for that wall***:

Q. And that wall depicted in the photos, do you know how many different pipes you had going into that wall?
A. That specific wall?
Q. Yes.
A. I had zero.
Q. No pipes?
A. Not in that wall.
Q. And that's because the plumbing was against a different wall, was it not?
A. Correct.
Q. So in terms of the scaffold at that location, you were never on that scaffold, were you?
A. Correct.

* * *

Q. The scaffolding as depicted in the pictures in front of you, you never used that scaffolding at that location ever, correct?
A. Correct. [Allen Dep, Appendix 14, pp 28, 57.]

There has also been claims that electrical contractors worked on the hydro mobile. Eric Koshurin was an apprentice electrician on the Fort Custer project. (Eric Koshurin Deposition, Appendix 15, p 7) Koshurin claimed that he and his foreman worked on the hydro mobile to run pipes/conduit and install some electrical boxes. (Koshurin Dep, Appendix 15, pp 10-11, 38) Koshurin admitted, however, that the electricians would not be on the hydro mobile once it

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passed 20 or 25 feet in height. (Koshurin Dep, Appendix 15, p 11) Koshurin later reiterated that the electricians were not on the hydro mobile scaffolding once it passed 20 feet in height: "Yes. I think 20 foot would be the highest that we were at on the scaffolding." (Koshurin Dep, Appendix 15, pp 43, 70-71) Koshurin admitted that the scaffolding had passed the height at which the electricians would work on the hydro mobile ***a week before the fall at issue in this case***:

> Q As far as you know, the only people on the scaffold on the day of the accident were the masons; correct?
> A Correct.
> Q Do you recall when you had last been on that scaffold before Mr. Dancer fell?
> A Maybe somewhere around the area of a week.
> Q So in the week or so before Dancer fell, you don't recall anybody, other than the masonry people, being on the scaffold; correct?
> A Correct.
>
> * * *
>
> Q That scaffold, for that week before the accident, that wasn't a work area for you?
> A No.
> Q And you don't remember anybody else working on the scaffold?
> A No.
>
> * * *
>
> Q So it had been some days, up to a week, before you had --
> A Correct. That's what I was saying, it had to be at least a week maybe. I don't -- I can't recall how fast they were moving up but...
> Q So if you were on that scaffolding, you certainly weren't on it within the week before Mr. Dancer fell?
> A No.
> Q Is that correct?
> A Correct. [Koshurin Dep, Appendix 15, pp 54-55, 70.]

All of the testifying witnesses agreed that no other contractors besides the Liedal & Hart masons used the hydro mobile scaffolding once it reached a height of 20 feet. (Schaibly Dep, Appendix 12, pp 137-138; Allen Dep, Appendix 14, pp 6, 17-18; Tammie Waterman Deposition, Appendix 16, p 102-103) Therefore, in the light most favorable to the plaintiffs, the hydro mobile scaffolding had been used solely by one trade for at least a week. (Koshurin Dep,

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Appendix 15, pp 54-55, 70) The hydro mobile was at approximately 40 feet at the time of Dancer's fall while other trades stopped using it around 20 feet. (Complaint, Appendix 2, ¶ 12; Koshurin Dep, Appendix 15, 43, 70-71)

III. DANCER'S FALL

The incident in question in this matter occurred on August 9, 2010. (Complaint, Appendix 2, ¶ 12) On that day, Liedal & Hart was using the hydro mobile scaffolding to work on a concrete block wall 40 feet in the air. (Complaint, Appendix 2, ¶ 12; Dancer Dep, Appendix 6, p 22; Waterman Dep, Appendix 16, p 104) Plaintiffs have conceded that no other trades were using the hydro mobile that day: "Employees from other subcontractors were not on the scaffold that morning." (Plaintiffs' brief in the Court of Appeals, p 21) In fact, there were no other trades even working in the area of the wall that morning. (Martin Dep, Appendix 10, p 28)

Early in the morning on August 9, 2010, other Liedal & Hart employees had used the hydro mobile without any problems. There were no openings or problems with the planking because the Liedal & Hart employees were walking and standing on the planking without incident. (Johnson Dep, Appendix 8, pp 13-14, 38; Martin Dep, Appendix 10, p 111) The hydro mobile had also been inspected that morning by a component person for Liedal & Hart who cleared it for work. (Martin Appendix 10, p 51; Stewart Dep, Appendix 11, p 25)

Liedal & Hart employees then took their usual break at 9:30 a.m. Because it had started raining that morning, Nick Martin, the Liedal & Hart, foreman called off work for the day because the weather affected the masonry work. Martin just kept a few workers to prepare for the next day. (Johnson Dep, Appendix 8, pp 19-21; Martin Dep, Appendix 10, pp 26-27) Dancer was among the people that Martin asked to stay at work that morning. (Martin Dep, Appendix 10, p 27) Only Dancer and the crane operator, Glenn Johnson, returned to the work

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area. Dancer returned to the hydro mobile while Glenn Johnson returned to his crane. (Johnson Dep, Appendix 8, pp 5, 25) Nick Martin, Liedal & Hart's foreman, assigned Dancer to raise the hydro mobile. He did not assign anyone else to do this with Dancer or to supervise Dancer. (Martin Dep, Appendix 10, pp 29-30) Martin went to the work trailer to look at blueprints while the other two remaining workers were assigned cleaning tasks. (Martin Dep, Appendix 10, pp 30-32)

In the process of raising the hydro mobile, typically, the planking for the work platform would not need to be moved. (Johnson Dep, Appendix 8, pp 43-44) But on the day of his fall, Dancer encountered a clamp and a board used to establish the angle of the wall Liedal & Hart was building. Dancer had to move the planks to get around the clamp. (Kyewski Dep, Appendix 7, p 17; Johnson Dep, Appendix 8, p 12; Stewart Dep, Appendix 11, pp 41-42) Glenn Johnson reiterated that Dancer could not raise the hydro mobile without moving the planking. (Johnson Dep, Appendix 8, pp 44, 79) But when replacing the planking after the move, Dancer failed to properly overlap the planking over the outrigger so that the planks would be properly supported. Glenn Johnson, the eyewitness crane operator explained:

> A These plank that are on top now were over on top of those.
> Q Before Mr. Dancer moved them?
> A Yes.
> Q And then once he moved them, the plankings no longer overlap the braces?
> A No. The plank -- these two plank that he moved were no longer overlapped here, but the plank underneath were sticking out and that's -- that's basically why he went down. Because the plank underneath were not on the outrigger here and then he couldn't see that because the plank he slid back were on top of that gap.
> * * *
> Q Okay. Then you observed Mr. Dancer pull the two planks that are on top or slide those two planks to the right?
> A Yes.
> Q And that's how the planks existed at the time you previously testified Mr. Dancer walked on the planks from the right side of the photograph to the

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left --

A Yes.

Q -- stepped on the planks that extended from the left outriggers but were not overlapped with the two planks on top, at least overlapped to the left outrigger, that caused it to tip --

A Yes.

Q -- and Mr. Dancer to fall, grabbed the wall, ultimately lose his grip and wall [sic fell] to the floor?

A Yes. [Johnson Dep, Appendix 8, pp 30, 33-34.]

Glenn Johnson testified that Dancer created the hazard and that Dancer should have been wearing his fall protection while he was moving the planking:

Q Do you think that Mr. Dancer created a fall hazard when he moved the planking?

* * *

THE WITNESS: Yes, I believe, yes, yes.

Q (BY MR. CUDNEY) Do you think he should have been utilizing fall protection at the time?

* * *

THE WITNESS: I would assume, yes. Yes.

Q (BY MR. CUDNEY) I mean, if you had -- had you done this job before, moved the planking --

A Yes.

Q -- like Mr. Dancer had done?

A Yes.

Q How many times before?

A Numerous times on various jobs, you know.

Q If you had been involved in moving planking like Mr. Dancer did at the height that Mr. Dancer was working at the time before his fall, would you have been wearing fall protection?

A Yes. You were supposed to wear it if you're going to be creating a fall hazard, yes.

Q Would you, Glenn Johnson, have been wearing a harness and have it attached to the -- what did you call it, the retractable?

A Yes.

* * *

Q You were asked some questions about the use of fall protection, and you observed this whole thing unfold with Mr. Dancer falling. The fall protection is designed so that if he had been wearing his harness and he had been attached to the retractable lanyard he would not have fallen to the ground; would he?

A No.

* * *

Q That system is set up to prevent him from falling to the ground; is it not?

A Yes.

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* * *

Q (BY MR. DAVIDSON) And, in fact, based on your experience if he had been wearing his fall protection and if he had been attached to the retractable lanyard, even with him stepping on a plank and falling through he would not have fallen to the ground; would he?

* * *

THE WITNESS: I don't believe so.

Q (BY MR. DAVIDSON) And he wouldn't have been injured; would he?

* * *

THE WITNESS: I don't believe so, no. [Johnson Dep, Appendix 8, pp 49-50, 63-64.]

A safety harness was available to Dancer to use when he was moving the planking. John Stewart testified that, "[t]here was fall protection available on the scaffolding." (Stewart Dep, Appendix 11, p 22) He elaborated that a harness and lanyard with proper tie off points were available to Dancer on top of the hydro mobile on the morning of his fall. (Stewart Dep, Appendix 11, pp 22-23, 25) Nick Martin also testified that a safety harness and lanyard were on top of the hydro mobile on the day of the fall:

Q When you got up there you saw a safety harness attached to a lanyard?

* * *

THE WITNESS: A retractable. A safety harness attached to a retractable.

Q (BY MR. DAVIDSON) Yes?
A Yes.
Q You saw that?
A Yes.
Q You took a picture of it?
A I did.
Q And that's a fall protection device; is it not?
A Yes. [Martin Dep, Appendix 10, p 39.]

Johnson also testified that there was a retractable safety lanyard and harness up on the hydro mobile the day of the fall. The lanyard and harness were a portable device. (Johnson Dep, Appendix 8, pp 35-37, 61, 81, 123-124) Johnson testified that they "anchored in numerous different spots" on the scaffolding and that it was the worker's job to make sure that the lanyard was anchored in the correct location for his work. (Johnson Appendix 8, p 124)

Glenn Johnson, who was again the only eye witness, testified that he was sure that it was

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Dancer who moved the planking that led to the fall hazards and Dancer's subsequent fall:

Q (BY MR. CUDNEY) Did you see Mr. Dancer move these planks that are on the top depicted in the photograph Exhibit D-2?
A Yes.
Q Did you see him move those to the right --
A Yes.
Q -- sometime earlier that day?
A He slid those over. . . .

* * *

Q But you don't have any doubt that it was Ronnie Dancer that moved the planks?

* * *

THE WITNESS: He was the only one up there, yes.
Q (BY MR. CUDNEY) And before he went up there after the break did you observe other masons or mason tenders walk across this plank?
A Yes. That morning, yes.
Q And did they walk across that planking without incident?
A Yes.
Q In other words, the planking did not flip up --
A No.
Q -- as you described when Mr. Dancer walked across it?
A No.
Q Is that correct?
A Yes.
Q In fact, in your written statement that you produced the day after this incident, Exhibit A, you write foot plank must have been moved because bricklayers were on scaffold working that morning. Is that correct?
A Yes.

* * *

Q Do you think that Mr. Dancer created a fall hazard when he moved the planking?

* * *

THE WITNESS: Yes, I believe, yes, yes.

* * *

Q (BY MR. DAVIDSON) So based upon your observations, you saw Mr. Dancer moving the planking; correct?
A Yes.
Q And between the time you saw him move planking and the time he fell, no one else was on the scaffold?
A No.
Q No one else was moving the plank?
A No.
Q So whether Mr. Dancer realized it or not, he's the one that created that fall hazard; isn't he?

* * *

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THE WITNESS: Yes. [Johnson Dep, Appendix 8, pp 29-30, 38, 49, 64.]

All other witnesses testified consistently with Glenn Johnson that Dancer moved the planking that created the fall hazard that led to Dancer's fall and that he should have been using fall protection when he created the hazard. (Kyewski Dep, Appendix 7, pp 17, 34-35; Martin Dep, Appendix 10, pp 40-42, 111, 124, 126-127; Stewart Dep, Appendix 11, pp 26-27, 42; Kelly Dep, Appendix 13, pp 64-65, 119-120; Schaibly Dep, Appendix 12, p 111; Waterman Dep, Appendix 16, pp 92-93)

Plaintiffs have argued that special bridges were required instead of the planking moved by Dancer connecting the hydro mobiles together. But Tom Destafney testified that a special bridge would not have changed the risk at issue as the planks on the bridge would still have to be moved for the obstacles on the walls that Dancer was avoiding. (Destafney Dep, Appendix 22, pp 46-47, 74-75, 80, 93)

Dancer testified that he did not have any memory of the events. (Dancer Dep, Appendix 8, p 17) ***But Dancer previously admitted to Brad Leidal of Leidal & Hart that he had moved the planking***:

Q He did tell you he moved some planks though?
A Yes. [Leidal Dep, Appendix 5, p 35.]

Dancer also apologized to Nick Martin and admitted that Dancer had "screwed up" in the fall. (Martin Dep, Exhibit 10, p 34-45)

Plaintiffs' expert Michael Wright also testified regarding plaintiffs' theory regarding how the accident occurred and offered an opinion and drawing directly consistent with Glenn Johnson's testimony regarding Dancer creating the hazard by moving the planking so that it did not properly overlap the outriggers for support:

Q. All right. We've got Exhibit No. 12 here, and what you're doing is giving your opinion as to what -- how Ronnie Dancer laid down the boards that

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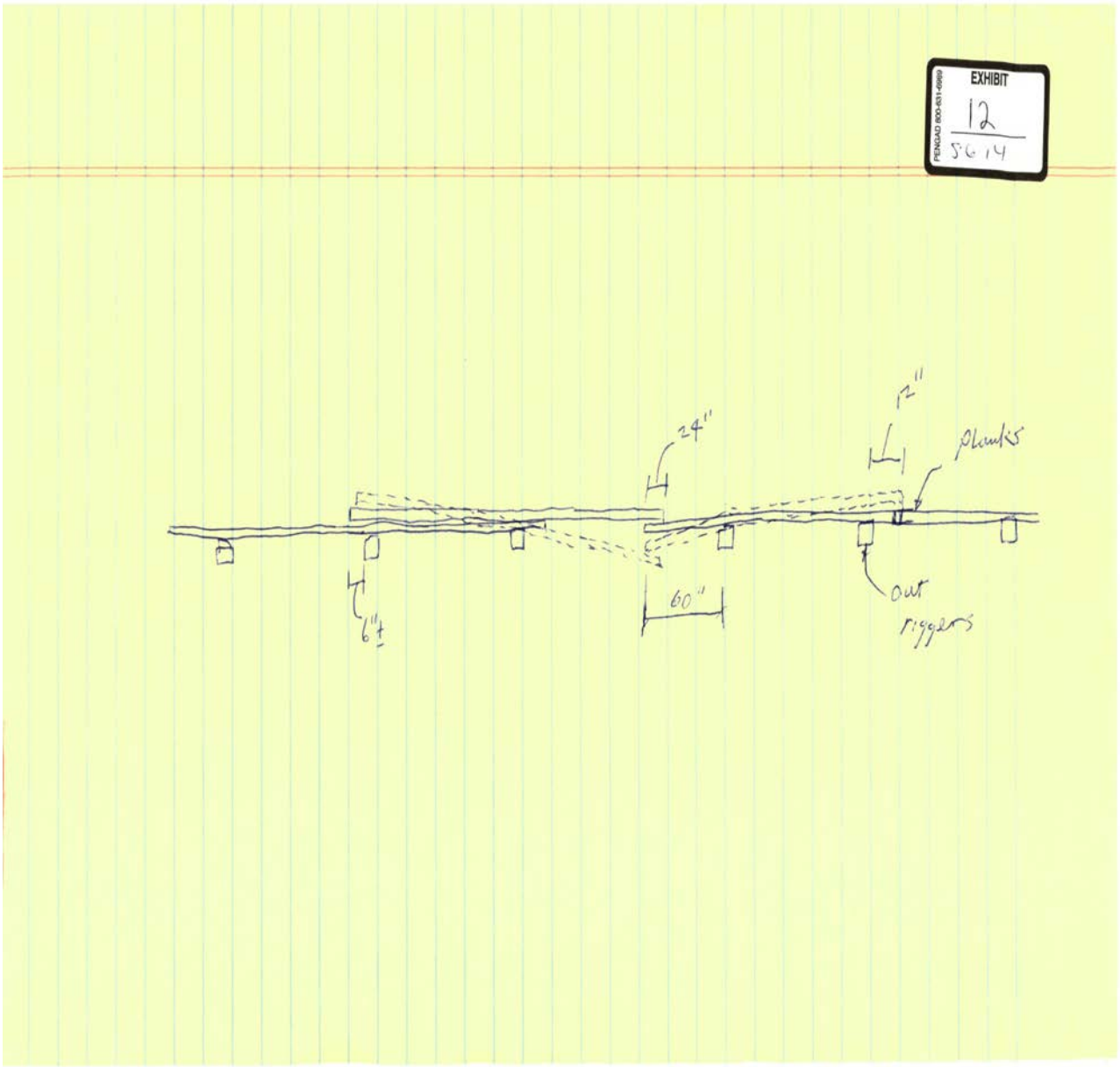
morning that would have allowed the board to flip up as Glen Johnson, the crane operator, testified. Is that a fair assessment?

A. Yes. [Michael Wright Deposition, Appendix 17, p 89.]

Wright's drawing shows that Dancer failed to push the planking all the way across the gap between the hydro mobile so that the planking would be resting on the outrigger for support, which created a trap of unsupported planking with no clear opening between the ends of the planks but the unsupported planks would fall when walked on:



Thus, there is no dispute regarding how the accident happened and that Dancer created the risk

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that he faced at the time of the incident.

There is also no dispute that Dancer was alone on the scaffolding at the time of the incident. Glenn Johnson, the only eye witness, testified:

> Q Was he the only one working on the scaffolding at the time?
> A Yes.
>
> * * *
>
> Q He was the only person on the scaffolding at that time?
> A At that time, yes.
> Q In fact, after break time ended and before or up to the time of his fall was he the only person on the scaffolding?
> A Yes. [Johnson Dep, Appendix 8, pp 12, 24.]

The other witnesses agreed with Glenn Johnson that no one else was on the scaffolding when Dancer was moving the planking and falling through the gap he created. (Leidal Dep, Appendix 5, p 35; Martin Dep, Appendix 10, pp 29-30, 47; Stewart Dep, Appendix 11, p 27; Schaibly Dep, Appendix 12, p 111) The only witness to state that there may have been others on the scaffolding with Dancer at the time of his creation of the hazard was Eric Koshurin, the apprentice electrician. But Koshurin admitted that he could not see Dancer at the time Dancer fell because Koshurin was around the corner, on the other side of two walls, and 20 to 30 feet away. (Koshurin Dep, Appendix 15, pp 27, 82) Thus, Koshurin could not offer testimony to state that others faced the same risk as Dancer after Dancer created that risk. Instead, the only eye witness testimony is from Glenn Johnson who repeatedly testified that Dancer was alone. (Johnson Dep, Appendix 8, pp 12, 24)

Dancer's improper placement of the planking on the hydro mobile only existed for minutes as Nick Martin testified that everything was fine 20 minutes beforehand:

> Q All right. But you know that from what you were told and as you report in your notarized statement, you believed that he had readjusted planks on that lower -- that lower level of the platform; true?
> A He must have.
> Q Okay. And did you reach that conclusion because he just must have or because Glenn Johnson said he saw him do it?

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A I didn't know. ***He must have moved them because there were people working on the same exact platform 20 minutes before that and nobody else was up there except for him***.
Q And you -- so far as you know there was no opening in the platform at the time he fell; true?
A There was no opening.
Q How do you know that?
A Because there was people working up there 20 minutes before that. [Martin Dep, Appendix 10, pp 110-111.]

Thus, in total, the evidence shows that the hazard that led to Dancer's fall was created by Dancer, only existed for minutes, could not be seen by someone on the ground looking at the hydro mobile, and only presented a risk to Dancer who was working alone without his fall protection, despite it availability.

IV. PROCEDURAL HISTORY

Plaintiffs originally filed suit in Wayne County Circuit Court on December 15, 2011 against Clark. This suit was voluntarily dismissed. Plaintiffs refiled the case against Clark in Wayne County on January 27, 2012. A motion for change of venue was subsequently filed and granted by the Wayne Circuit Court, transferring the case to Kalamazoo Circuit Court. Plaintiffs then filed a second amended complaint, which added BBC to the case. (Complaint, Appendix 2) After considerable discovery occurred in the case, defendants each filed a motion for summary disposition based on the fact that plaintiffs could not prove liability against the general contractor defendants pursuant to the common work area doctrine.

Oral argument occurred on the motions for summary disposition on July 21, 2014. Both defendants argued that the elements of the common work area doctrine, the only raised basis for liability in this matter, did not exist. (Summary Disposition Motion Transcript, Appendix 18) Plaintiffs responded by arguing that defendants were supposedly contractually required to require that Liedal & Hart used bridges rather than the planking for the gaps between the hydro mobiles and that this supposed contractual requirement should somehow be added into the

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common work area doctrine. (Transcript, Appendix 18 pp 29-31, 37-39) Defendants responded by pointing out that there was no agreement that any contract provision was breached, and regardless, that plaintiffs could not raise a breach of contract claim but had to prove the elements of the common work area doctrine, which they could not do. (Transcript, Appendix 22, pp 39-42)

The trial court issued its opinion and order granting defendants summary disposition on September 3, 2014. (Trial Court Order, Appendix 19) The trial court found that Dancer created the risk when he failed to wear his fall protection while he was improperly overlapping the planking. It concluded that this did not present a high degree of risk to a significant number of workers because Dancer was the only one to face this risk. (Order, Appendix 19, p 4) The trial court also concluded that Dancer was not in a common work area because other trades had stopped using the hydro mobile at 20 feet, long before Dancer's fall at 35 to 40 feet. (Order, Appendix 19, p 5)

Plaintiffs filed their claim of appeal on October 27, 2014. Oral argument occurred on February 2, 2016. The Court of Appeals issued its split unpublished opinion on April 26, 2016. The Court of Appeals majority concluded that it did not matter that other trades had stopped using the hydro mobile scaffolding, essentially concluded that once the hydro mobile was a common work area, it remained a common work area for the project. (Majority Opinion, Appendix 20, pp 3-4) The majority also concluded that it did not matter that Dancer created the risk that caused his fall and ignored the fact that Dancer did not wear available fall protection. Instead, the majority unilaterally determined that the use of unsecured planking to connect the hydro mobile "was dangerously unstable by its nature," essentially finding that defendants had to meet some standard higher than MIOSHA safety requirements allowing for unsecured planking.

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(Majority Opinion, Appendix 20, p 9) Judge Wilder dissented noting that Dancer fell from an elevation at which only Liedal & Hart contractors worked, which precluded finding liability under the common work area doctrine. Judge Wilder noted that the majority's conclusion was a "step toward imposing strict liability on general contractors for all hazards on construction sites." (Dissent Appendix 1, p 1-2)

Because the Court of Appeals majority failed to follow this Court's binding precedent regarding the common work area doctrine, Clark and BBC filed applications for leave to appeal. This Court granted a Mini-Oral Argument on Clark's application regarding the third and fourth elements of the common work area on December 21, 2016 and left BBC's motion pending.

ARGUMENT

I. STANDARD OF REVIEW

"The applicability of a legal doctrine is a question of law that we review de novo." *Ghaffari v Turner Constr Co*, 473 Mich 16, 19; 699 NW2d 687 (2005). This Court reviews decisions to grant summary disposition de novo. *Allison v AEW Mgmt LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). As this Court has explained:

> A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Id*. at 120; see also MCR 2.116(C)(10). [*Allison*, 481 Mich at 424-425.]

The burden of proof is on plaintiffs to prove their case, and a defendant is entitled to summary dispositions when it shows that the plaintiff has failed to offer sufficient evidence to carry that burden:

> Defendant is not required to go beyond showing the insufficiency of plaintiff's evidence. The Court of Appeals erred when it imposed an additional requirement on defendant: to proffer evidence to negate one of the elements of

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> plaintiff's claim. As discussed, the rule is well established that a moving party may be entitled to summary disposition as a result of the nonmoving party's failure to produce evidence sufficient to demonstrate an essential element of its claim. [*Lowrey v LMPS & LMPJ, Inc*, __Mich__; __NW2d__ (December 13, 2016, Docket No. 153025) slip op p 7.]

II. PRESERVATION OF THE ISSUES

The issues on appeal are preserved as they were raised below and addressed by the lower courts. (Trial Court Order, Appendix 19; Majority Opinion, Appendix 20)

III. PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT WITH REGARD TO THE COMMON WORK AREA DOCTRINE'S THIRD ELEMENT OF A DANGER CREATING A HIGH DEGREE OF RISK TO A SIGNIFICANT NUMBER OF WORKMEN

"It has long been established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004). Rather, "The immediate employer of a construction worker . . . is immediately responsible for job safety." *Funk v Gen Motors Corp*, 392 Mich 91, 102; 220 NW2d 641 (1974). The Michigan Occupational Safety & Health Act provides that it is the *employer's* duty to provide each employee with a safe place to work. MCL 408.1011. In addition, employees in Michigan are protected pursuant to the Michigan Workers' Compensation Act by workers' compensation insurance provided by their employer, as Dancer was in this case. MCL 418.301; *Simpkins v Gen Motors Corp*, 453 Mich 703, 710; 556 NW2d 839 (1996). This Court, however, has created two narrow exceptions to the general rule of nonlialbity for general contractors: 1) the common work area doctrine recognized in *Funk*; and 2) the inherently dangerous activity doctrine as recognized in *DeShambo*. Only the former is at issue in this case. The common work area doctrine requires the proof of four elements:

> (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Ormsby*, 471 Mich at 57.]

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A plaintiff must prove each one of these four elements in a common work area case; if even one element is missing, there is no general contractor liability. *Id*. at 59 n11.

A. The Risk At Issue is Dancer's Failure to Wear Available Fall Protection While Moving Planking

The first element at issue in this appeal is the third element, "a high degree of risk to a significant number of workmen". *Id*. at 57. Inherent to this consideration is a determination of the risk that is at issue in the case as the Court must determine what risk the general contractor is alleged not to have eliminated from the alleged common work area. This is necessary because, as this Court has explained, a general contractor is not required to act as an insurer guarding against every possible risk on a construction site:

> To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an *unavoidable* condition of construction work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites. In some situations, a general contractor may be able to remove a particular hazard, but general contractors simply cannot remove all potential hazards from a construction workplace. If a hazard cannot be removed, the general contractor can take reasonable steps to require workers to use safety equipment and procedures, thereby largely reducing or eliminating the risk of harm in many situations. [*Latham v Barton Malow Co*, 480 Mich 105, 113-114; 746 NW2d 868 (2008), emphasis original.]

As *Latham* makes clear, a general type of danger such as working at heights is not sufficient to satisfy the common work are requirements. Instead, the plaintiff must demonstrate that the other workers and other subcontractors ***faced the same specific hazard as caused the plaintiff's injury.*** The Court of Appeals addressed this issue in *Hughes v PMG Bldg Inc*, 227 Mich App 1; 574 NW2d 691 (1997). In that case, the plaintiff was working on a roof overhang that collapsed. The plaintiff attempted to focus on the general nature of the risk so as to include more workers who all faced some danger of the roof collapsing. The Court rejected this and

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instead, ruled that the other workers must face the exact same hazard as the plaintiff:

> We find that plaintiff has failed to provide evidence suggesting that a general issue of material fact exists regarding whether plaintiff was injured while working in a "common work area." Plaintiff characterizes the alleged danger at issue in this case as "the danger of collapse of the porch overhang." Since other contractors performed work on the exterior of the house in the vicinity of the overhang, plaintiff argues that these workers were exposed to the same risk and that the overhang constituted a "common work area." In support of this argument, plaintiff points out that workers from State Carpentry assembled and attached the porch. Another subcontractor, Robert Wurm, installed the siding on the overhang. Yet another contractor would later be pouring the cement for the support stanchions. However, there is no evidence in the record that the employees of any other trade would work on top of the porch overhang. In all probability, after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers. Thus, giving plaintiff the benefit of any reasonable inferences, ***we cannot say that other workers would be subject to the same hazard***. [*Id*. at 6-7, emphasis added.[2]]

Although not binding, the Sixth Circuit reached the same conclusion when applying Michigan's common work area law in *Smith v BREA Prop Mgmt of Michigan LLC*, 490 Fed Appx 682 (CA 6, 2012).[3] In that case, the plaintiff worked for a siding contractor using scaffolding. An electrical contractor had to access the scaffolding to access a light in the way of the siding. *Id*. at 682-683. After the electrical contractor left the scaffolding, the siding contractor accessed it again that day. In the process of putting a tarp on the scaffolding, wind caught the tarp causing the scaffolding to collapse. Despite the electrician being on the scaffolding shortly before the collapse and despite complaints being raised regarding how the scaffolding was tied to the building throughout the project, the Court found no common work area because the electrician did not face the same risk as the siding contractor because the scaffolding was modified to add the tarp:

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[2] This Court subsequently cited and adopted *Hughes* as properly stating the law regarding the common work area doctrine in *Ormsby*. *Ormsby*, 471 Mich at 57 n9.

[3] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v 3M*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

> However, Smith has failed to establish that the electrician or the security workers were "subject to the same risk or hazard" as the SDI employees. The electrician, Daniel Szymanski, employed by BREA, filed an affidavit stating that he performed only 10-15 minutes of work, removing a light fixture, while the SDI employees were not working. This was corroborated by the depositions of SDI employees Smith and Pavlinak, who said they took an early lunch break while the electrician worked. The risk or hazard in this case was not that the scaffold would collapse at any point, but that the scaffold might collapse during SDI's efforts to attach the tarp. Thus, the electrician was not subject to the risk posed by the scaffold collapsing—he was not present during the window in which the workers on site were exposed to the risk of the tarp pulling the scaffold away from the building. The security personnel, who were never even seen by the SDI employees, also were not subject to the same risk as Smith. Every deposition taken stated that security workers erected the barriers on site before SDI began its work. At the time of the hazardous activity then, and for several hours before, SDI was the only contractor on the site. There were no other subcontractors subject to the same risk as Smith. Therefore, under Ormsby's rationale, Smith failed to establish that the site was a common work area. [*Id*. at 686.]

This available precedent makes clear that, under *Funk* and *Ormsby*, the question is what was the risk that led to Dancer's injury in this case.

While plaintiffs have attempted to expand the risk (just as the plaintiff attempted to do in *Hughes* and *Smith*) to cover any use of unsecured planking on any hydro mobile scaffolding, this was not what the risk was according to plaintiffs' own expert. Plaintiffs' expert drew the risk faced by Dancer during his deposition (Wright Dep, Appendix 17, p 89):

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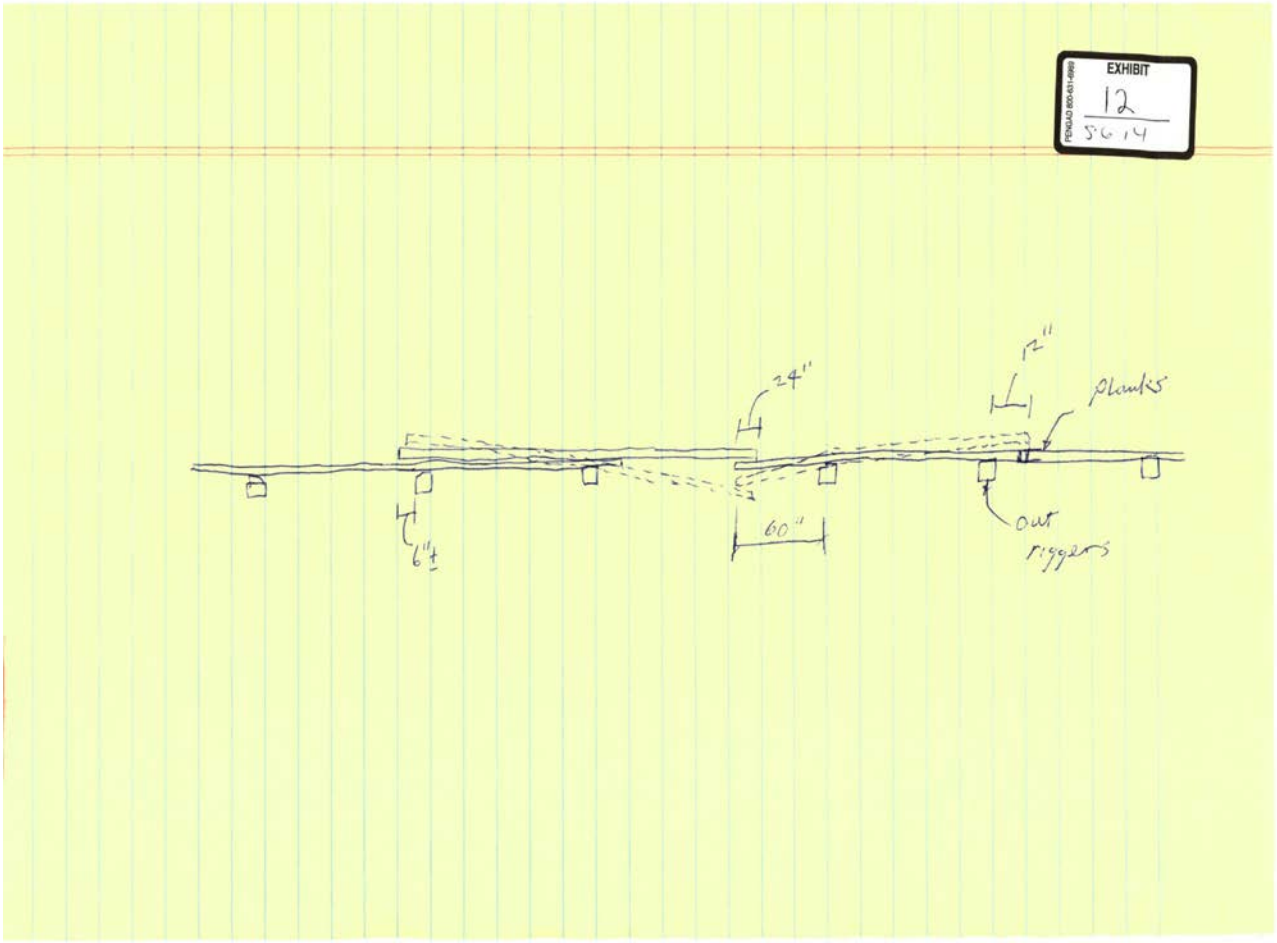

In the expert's testimony, he conceded that this risk was not the same as properly laid planking that overlapped the outriggers because the properly laid planking would not flip like what occurred when Dancer fell. (Wright Dep, Appendix 17, pp 90-98) Plaintiffs' expert compared his drawing of the misplaced planking to how the hydro mobile was set up at other times. Plaintiffs' expert referenced the following photo of in his deposition:

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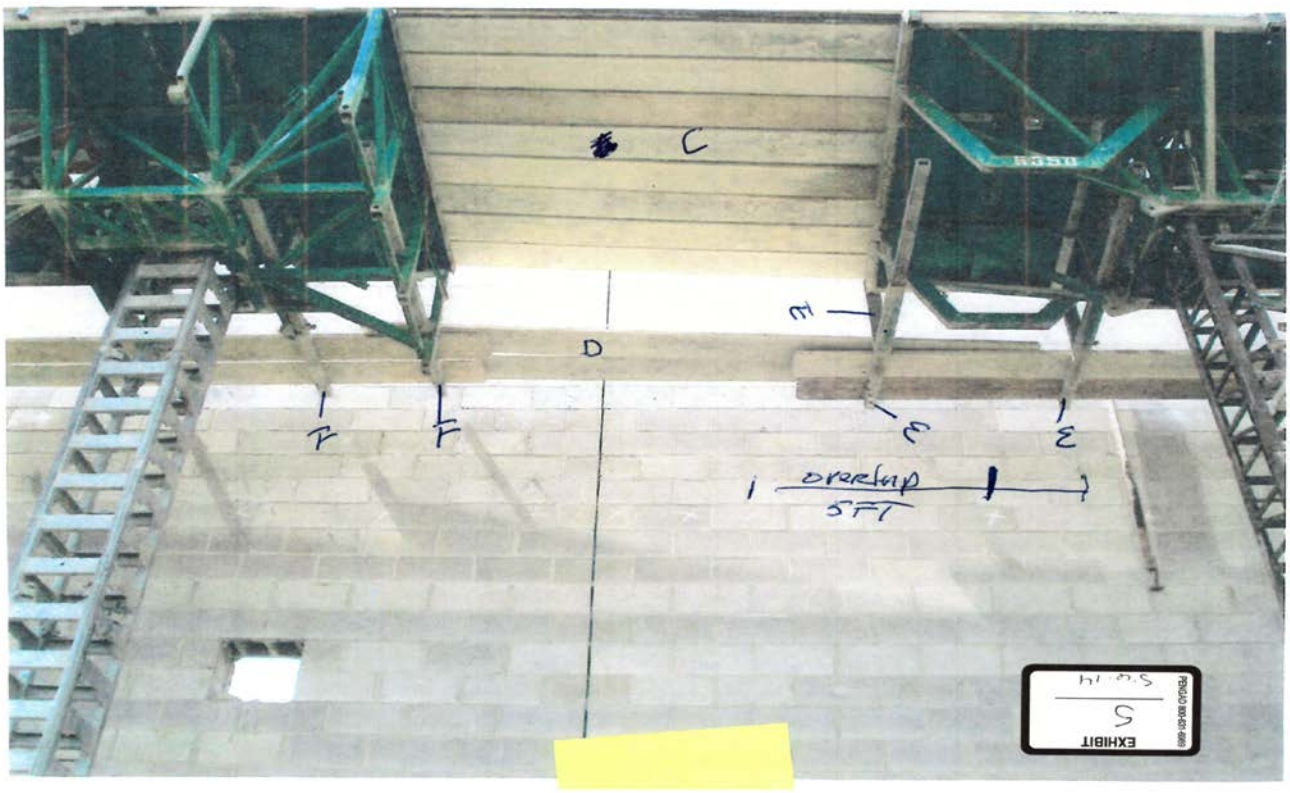

Plaintiffs' expert explained that the planking in this photo would not flip up as led to Dancer's fall in this case:

> Q. Okay. So you're explaining to me how this board gets to flip up. Because it doesn't seem physically possible for a board to flip up based upon what we're looking at, right, Exhibit 5?
> A. Exhibit 5.
> But if you reverse it like I'm showing in Exhibit 12, that's the danger.
> Q. What did you reverse?
> A. ***See, Exhibit 5 is a perfect setup after the accident by somebody to show how safe they are.***
> Q. Well, I thought you said the 60-inch overlap wasn't good.
> A. It's not good.
> Q. ***But it can flip up?***
> A. ***Not in this way, not in Exhibit 5.*** [Wright Dep, Appendix 17, p 93, emphasis added.]

The misplaced planking that did not extend over the outrigger was how Dancer fell according to plaintiffs' own expert. And according to that expert, Dancer's fall could not happen had the planking been pushed over properly onto the outrigger for support. (Wright Dep,

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Appendix 17, p 93) The expert also conceded that a properly anchored safety lanyard could have also prevented the fall. (Wright Dep, Appendix 17, p 166) Thus, this is the risk at issue was facing improperly placed planking while not wearing proper fall protection. Dancer was the only one to face this risk that he created.

Most importantly, A safety harness was indisputably available to Dancer to use when he was moving the planking. John Stewart testified that, "[t]here was fall protection available on the scaffolding." (Stewart Dep, Appendix 11, p 22) He elaborated that a harness and lanyard with proper tie off points ***were available to Dancer on top of the hydro mobile on the morning of his fall***. (Stewart Dep, Appendix 11, pp 22-23, 25) Nick Martin also testified that a safety harness and lanyard were on top of the hydro mobile on the day of the fall. (Martin Dep, Appendix 10, p 39) Johnson similarly testified that there was a retractable safety lanyard and harness up on the hydro mobile the day of the fall, and that the lanyard and harness were a portable device. (Johnson Dep, Appendix 8, pp 35-37, 61, 81, 123-124) Johnson testified that they "anchored in numerous different spots" on the scaffolding and that it was the worker's job to make sure that the lanyard was anchored in the correct location for his work. (Johnson Appendix 8, p 124)

Thus, Dancer could have worn a safety harness, but decided not to do so in this case. Dancer was required, however, to wear that safety harness once he moved the planking. John Stewart from MIOSHA testified that, when the planking on the scaffolding was properly placed, no further fall protection was required besides the existing guardrails. But when planking was moved, other fall protection would be required because there was an opening in the protection system not guarded by the guard rails. (Stewart Dep, Appendix 11, pp 43-44, 46) Simply, when Dancer went up to the scaffolding initially and when others were on the scaffolding, Dancer did

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not need to wear a harness because there was no opening for him to fall through. But once Dancer started moving the planking, Dancer had to wear the fall protection device until he moved the planking back correctly into place over the outrigger so that an opening in the guardrail system no longer existed. Dancer never did this. His decision not to wear the fall protection offered to him is the cause of the incident and cannot be blamed on defendants as Dancer had the option to protect himself on the hydro mobile. (Johnson Dep, Appendix 8, pp 35-37, 61, 81, 123-124; Martin Dep, Appendix 10, p 3; Stewart Dep, Appendix 11, pp 22-23, 25)

When one considers the actual risk at issue in this case, the failure to properly overlap the 16-foot long planks to properly rest on outriggers, while not wearing fall protection, there can be no high degree of risk to a significant number of workers. Glenn Johnson, the only eye witness to the fall, testified that Dancer was the only person on the scaffolding when Dancer moved the planking:

> Q Was he the only one working on the scaffolding at the time?
> A Yes.
> * * *
> Q He was the only person on the scaffolding at that time?
> A At that time, yes.
> Q In fact, after break time ended and before or up to the time of his fall was he the only person on the scaffolding?
> A Yes. [Johnson Dep, Appendix 8, pp 12, 24.]

The other witnesses agreed with Glenn Johnson that no one else was on the scaffolding when Dancer was moving the planking and falling through the gap he created. (Leidal Dep, Appendix 5, p 35; Martin Dep, Appendix 10, pp 29-30, 47; Stewart Dep, Appendix 11, p 27; Schaibly Dep, Appendix 12, p 111) The only witness to state that there may have been others on the scaffolding with Dancer at the time of Dancer's creation of the hazard was Eric Koshurin, the apprentice electrician. But Koshurin admitted that he could not see Dancer at the time Dancer fell because Koshurin was around the corner on the other side of two wall and 20 to 30 feet

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away. (Koshurin Dep, Appendix 15, pp 27, 82) Thus, Koshurin could not offer testimony to state others faced the same risk as Dancer after Dancer moved the planking creating an opening in the otherwise adequate guardrail safety system. What Koshurin was actually testifying to was the masons who were on the scaffolding ***before the break***, who were then sent home leaving only Dancer to go back up on the scaffolding. At that point, the only eye witness testimony is from Glenn Johnson who repeatedly testified that Dancer was alone and moved the planking. (Johnson Dep, Appendix 8, pp 12, 24, 29-30, 33-34, 38, 49-50, 63-64) Johnson's testimony was that he specifically saw that the planking was moved and knew that Dancer had moved the planking as Dancer was the only person on the hydro mobile when the planking was moved. (Johnson Dep, Appendix 8, pp 29-30, 38, 49, 64)

The Court of Appeals majority ignores *Latham* regarding the available fall protection. The majority found that the use of fall protection was not a question to be decided in deciding the common work area issue but found it to be a question of "duty, breach and comparative negligence for resolution at trial." (Majority Opinion, Appendix 20, p 8) This conclusion is fairly inexplicable. John Stewart's testimony makes the point abundantly clear. Fall protection was required when the planks were moved. It was not required when the planks were properly in place. (Stewart Dep, Appendix 11, pp 43-44) This testimony is consistent with the MIOSHA standards set forth in Part 45 Fall Protection of MIOSHA. This rule adopts OSHA Rule 1926.501(b), which indicates that fall protection could be offered by guardrails or personal fall arrest systems for holes. There is no testimony to the contrary.[4] The Court of Appeals

[4] The decision to find a question of fact despite the fact that plaintiffs did not offer contrary evidence is directly contrary to this Court's recent holding on the standard of review in summary disposition cases in *Lowrey*. *Lowrey* clarified that it is not the defendants' duty to present evidence to negate plaintiffs' burden of proof. The burden of proof is on plaintiffs to prove their case, and a defendant is entitled to summary dispositions when it shows that the plaintiff has

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majority's holding on this issue, then, is a direct rejection of this Court's holding in *Latham* that "because working at heights is generally an unavoidable condition of construction work, it cannot, by itself, be the avoidable danger. . . ." *Latham*, 480 Mich at 114. It is also directly contrary to *Latham*'s statement that "plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers. . . ." *Id*. at 115. The testimony shows that a harness and lanyard were available to Dancer, but he just chose not to use it. (Johnson Dep, Appendix 8, 35-37, 61, 81, 123-124; Martin Dep, Appendix 10, p 3; Stewart Dep, Appendix 11, pp 22-23, 25) The Court of Appeals decision should be reversed based on *Latham*.

B. Plaintiffs' Discussion of Contractual Requirements is Irrelevant And Cannot Change The Risk at Issue

Throughout this case, plaintiffs have focused their attack on whether defendants complied with various contractual requirements that plaintiffs allege exist in the myriad of documents and contracts existing for the project.[5] Defendants have repeatedly disputed the interpretation and

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failed to offer sufficient evidence to carry that burden:

> Defendant is not required to go beyond showing the insufficiency of plaintiff's evidence. The Court of Appeals erred when it imposed an additional requirement on defendant: to proffer evidence to negate one of the elements of plaintiff's claim. As discussed, the rule is well established that a moving party may be entitled to summary disposition as a result of the nonmoving party's failure to produce evidence sufficient to demonstrate an essential element of its claim. [*Lowrey v LMPS & LMPJ, Inc*, __Mich__; __NW2d__ (December 13, 2016, Docket No. 153025) slip op p 7.]

In this case, defendants have presented evidence that shows that plaintiffs cannot carry their burden as Dancer did not wear his fall protection, and plaintiffs cannot offer contrary evidence. Under the circumstances, defendants were appropriately granted summary judgment by the trial court and the Court of Appeals erred in finding a question for the jury on this point.

[5] Plaintiffs really contend that the actual requirements supporting their arguments regarding the problems with the planking are not really contained in the EM 385 contract document they have often cited in the various pleadings but instead rely on EM 385's reference to manuals, which plaintiffs contend points them to a manual for the hydro mobile stating that "[a]ny use of one or

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application of these supposed contractual rules relied on by plaintiffs in this matter. But the Court of Appeals majority appears to have been distracted by this issue in assessing the risk at issue in the case. In the end, this distraction regarding the contents of defendants' contracts is completely irrelevant to the case at hand. Plaintiffs have no right to attempt to enforce the contents of any such contract. Plaintiffs did not even raise a breach of contract claim in their second amended complaint. (Complaint, Appendix 2) Further, this Court has stated that" "We made clear in *Ormsby* that ***only*** when this test is satisfied may a general contractor be held liable for the alleged negligence of the employees of independent subcontractors with respect to job site safety." *Ghaffari*, 473 Mich at 21, emphasis added. The contractual provisions or requirements have nothing to do with common work are doctrine. This is especially true given that plaintiff are not third party beneficiaries of the contracts, and thus, have no right to enforce them. *Brunsell v Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002); *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003).

Ignoring this law, the Court of Appeals majority focused on plaintiffs' allegations regarding the contractual requirements and concluded that the planking itself constituted a hazard: "the work surface in question, with its reliance on unsecured planks to bridge gaps, where frequent adjustment of the planks was necessary as the surface was raised or lowered, was dangerously unstable by its nature." (Majority Opinion, Appendix 20, p 9) By implication, the Court of Appeals majority is ruling that all hydro mobile scaffolding must have secured and tied

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several Hydro Mobile motorized units, with or without accessories, in such a configuration or manner as not explicitly described in this manual is not recommended without the prior written permission of Hydro Mobile Inc." Plaintiffs interpret this to somehow eliminate the possibility of using planking as allowed by MIOSHA standards despite the fact that it does not even mention planking. In fact, this section has nothing to do with planking and instead deals with the use of replacement parts for the motor and equipment. (Destafney Dep, Appendix 22, pp 46-47, 74-75, 80, 93)

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down planking in order to satisfy the common work are doctrine, ***but this is a standard higher than the industry standard or required by MIOSHA regulations***. These planks were generally not required to be tied down to the outriggers and were only required to be tied down in heavy winds. (Johnson Dep, Appendix 8, p 95; Martin Dep, Appendix 10, pp 47-48, 90) This is standard in the industry. (Schaibly Dep, Appendix 12, pp 111-112) The MIOSHA standard for planking and scaffolding platforms specifically states: "where 16-foot planks are used as prescribed in subrule (7) of this rule, ***tie downs are not required unless wind uplift may occur***." R408.41217(5)(c), emphasis added. In fact, Walter Kyewski, Liedal & Hart's safety director, who had been properly trained in OSHA courses on use of hydro mobile scaffolding, testified that tying down the planking at each out rigger would, in fact, create trip hazards. (Kyewski Dep, Appendix 7, pp 5-6, 8, 54)

The rules for the proper use of the planking was controlled by MIOSHA standards, not the standards set in any particular manual. (Martin Dep, Appendix 10, p 70) John Stewart, Senior Safety Officer for MIOSHA, investigated the fall at issue in this case. Stewart saw that planking was used to connect the hydro mobiles to each other. He did not find any MIOSHA violations in the way the scaffolding was set up. (Stewart Dep, Appendix 11, pp 4, 13, 28, 40) John Stewart also testified that MIOSHA would not, and could not, impose standards higher than the MIOHSA standards. (Stewart Dep, Appendix 11, pp 36, 38, 40, 44)

In applying the actual MIOSHA standards to this case, if the planks are properly in place but not tied down, the MIOSHA standard are met, but when they are moved, fall protection is required:

> Q. If Ronnie Dancer had put back all the planks in this matter, at that point he's not required to use fall protection. Isn't that true?
>
> * * *
>
> A. That is not correct. It says if it's feasible the fall protection will be

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provided.

Q. (By MR. BENNER) Well, would it be your position that when the workers are up there standing on those planks that they have to be wearing fall protection?

A. They do not at that point.

Q. Okay. All right. And so if Ronnie Dancer is up there working and the planks have all been replaced, then he's not required to wear the fall protection?

* * *

A. But in the process of replacing them is when the fall protection would be required to be provided and used.

Q. (By MR. BENNER) Okay.

A. If feasible.

Q. Okay. But what I'm saying to you, if he's completed the task of putting the planks back in place, and he's completed that task, he's no longer required to be wearing fall protection?

* * *

A. That is correct, as long as the planks are properly reinstalled.

* * *

Q. As far as you know, based on your investigation, Better Built and Clark complied with all MIOSHA rules as it relates to Mr. Dancer's fall?

* * *

A. As it relates to the accident, I would say that's correct. [Stewart Dep, Appendix 11, pp 43-44, 46.]

Plaintiffs have complained that overlapping alone across the gaps was not sufficient to prevent the planks from shifting or flipping. Plaintiffs also have argued that additional outrigger supports should be required. But plaintiffs' arguments should be taken up with MIOSHA. MIOSHA has determined what is sufficiently safe for workers in our state. It is not the providence of the plaintiffs or the Court of Appeals majority to reject these standards and to create new industry standards on a piecemeal basis. "In construing administrative rules, courts apply principles of statutory construction." *Detroit Base Coalition for Human Rights of Handicapped v Director Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988). The primary rule of statutory construction is to apply the statute as written. *Roberst v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "Judicial construction of an unambiguous statute is neither required nor permitted." *McCormick v Carrier*, 487 Mich 180,

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191-192; 795 NW2d 517 (2010). As written, the special bridges, additional outriggers, and tie downs demanded by plaintiffs were not required by MIOSHA. And the failure to provide them cannot possibly be an unreasonably dangerous condition that defendants were required to alleviate.

The Court of Appeals majority simply ignored the testimony regarding industry standards and the MIOSHA standard and ***created a new industry standard of its own making that that general contractors must now meet to satisfy the common work area doctrine***.[6] It is not enough that a hydro mobile scaffolding be safe, but now, all potential risk of working on the hydro mobile must be eliminated. ***This is directly contrary to this Court's holding in Latham***: "To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law." *Latham*, 480 Mich at 113-114, emphasis original. And it should be reversed by this Court.

In line with this recreation of the safety standard applicable to scaffolding in the state of Michigan, the plaintiffs and the Court of Appeals majority rely on the testimony of Eric Koshurin who was an apprentice electrician on the Fort Custer project. (Majority Opinion, Appendix 20, pp 2, 9) Specifically, Koshurin testified: "I stepped on the edge of a board and another individual was on the other end and he ended up raising up and we both kind of danced back and forth till we both landed on something solid." (Koshurin Dep, Appendix 15, p 18) Koshurin's testimony about what supposedly occurred when he stepped on the planking in inherently different than what occurred with Dancer. Koshurin did not testify that the planking

[6] The Court of Appeals did so based on a disputed regarding of a contract that allegedly incorporated a disputed reading of a manual that plaintiffs had no legal right to enforce even if it said what plaintiffs' claim it said.

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was improperly set so as not to rest on the outrigger. Koshurin also never stated that there was a gap or an opening in the planking that would have required him to wear his fall protections as occurred with Dancer. Instead, he indicated that the planking came back down on "something solid" i.e. the outrigger.[7] (Koshurin Dep, Appendix 15, p 18)

Plaintiffs have questioned why Koshurin "nearly fell" two weeks earlier if Dancer created a new risk leading to his fall. The fact is that Koshurin did not "nearly fall" as he testified that the board he was standing on moved, but "landed on something solid." (Koshurin Dep, Appendix 15, p 18) What Koshurin faced was a risk inherent to the use of the hydro mobile. There will likely be some movement of the planking some times. But this does not mean that the system is unsafe. To the contrary, MIOSHA has determined that such a system is the appropriate means of setting up the hydro mobile. R408.41217(5)(c). In fact, Stewart saw how the planking was used to connect the hydro mobile to each other but did not find any MIOSHA violations in the way the hydro mobile was set up. (Stewart Dep, Appendix 11, pp 4, 13, 28, 40) What Koshurin, and, in turn, plaintiffs, are really objecting to are the MIOSHA standards allowing for planking to be placed on the hydro mobile scaffolding without being tied down. Again, the MIOSHA standard for planking and scaffolding platforms specifically states: "where 16-foot planks are used as prescribed in subrule (7) of this rule, ***tie downs are not required unless wind uplift may occur***." R408.41217(5)(c), emphasis added. Such 16-foot long planking was used in this case. (Martin Dep, Appendix 10, pp 47-48, 90) Koshurin, plaintiffs, and the Court of Appeals majority in relying on Koshurin's testimony were demanding something greater than the industry standard in this state. But the Court of Appeals has no right to rewrite MIOSHA standards. Such standards are controlled by the Michigan Occupational Safety and Health Act,

[7] Koshurin was young and inexperienced and likely just was not used to walking on planking on

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MCL 408.1001, *et seq*. and the rules created by the director as allowed by MCL 408.1069. The Court of Appeals majority overstepped its authority by essentially negating R408.41217(5)(c) and reading it out of existence in concluded the lack of tie downs meant that the hydro mobile was "dangerously unstable by its nature." (Majority Opinion, Appendix 20, p 9) ***There is some inherent risk in the use of scaffolding that cannot be eliminated***, ***but "general contractors simply cannot remove all potential hazards from a construction workplace***. . . ." *Latham,* 480 Mich at 113-114, emphasis added. Given that the hydro mobile met MIOSHA standards as described by Koshurin, he did not face the same risk as Dancer. Dancer faced a completely different risk in not wearing his fall protection while he created an opening in the hydro mobile system. There is no evidence of anyone else ever facing this risk.

In all, the scaffolding was safe when the planking was property in place. Pursuant to MIOSHA Chapter 45 and OSHA Rule 1926.501(b), the guardrail system is sufficient fall protection until a hole is opened which is not guarded by that guardrail system. At that point, either a new guardrail must be put in place to block the hole or a personal arrest system is required. Thus, while the planking is being moved, the guardrails are not sufficient and the person moving the planking should be wearing his fall protection personal arrest system. Dancer failed to do this in this case, ***and this is what caused his injuries***. No question of fact exists on this point given the consistent testimony of all the witnesses on issue is that Dancer created the hazard, had fall protection to use, but did not do so, which led to his injuries. (Kyewski Dep, Appendix 7, pp 17, 34-35; Johnson Dep, Appendix 8, pp 29-30, 35-38, 49, 61, 64, 81, 123-124; Martin Dep, Appendix 10, pp 22-23, 25, 40-42, 111, 124, 126-127; Stewart Dep, Appendix 11, pp 22-23, 25-27, 42; Schaibly Dep, Appendix 12, p 111; Kelly Dep, Appendix 13, pp 64-65,

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a scaffolding. But regardless, his testimony does not support plaintiffs' claims.

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119-120; Waterman Dep, Appendix 14, pp 92-93) The Court of Appeals majority erred as a matter of law in ignoring the actual testimony of these witnesses and ignoring the actual regulations regarding the use of the hydro mobile scaffolding. It should be reversed as a result.

C. One Worker is Not A Significant Number and Dancer's Failure to Wear His Fall Protection Does Not Create a Risk To Others

This case is controlled by *Latham*, where this Court stated: "plaintiff's own failure to wear a fall-protection device did not create a high degree of risk to a significant number of workers. . . ." *Latham*, 480 Mich at 115. As detailed above, Dancer had fall protection on the hydro mobile that he could have used. (Johnson Dep, Appendix 8, 35-37, 61, 81, 123-124; Martin Dep, Appendix 10, p 3; Stewart Dep, Appendix 11, pp 22-23, 25) Dancer decided not to. But this decision cannot possibly create a high degree of risk to a significant number of workers. This entitled defendants to summary judgment. *Id*.

Further, this Court has indicated that the number of workers should be judged at the relevant that time the plaintiff was injured: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby*, 471 Mich at 59 n12. Thus, the relevant consideration is who will face the same danger as it existed at the time of the injury. At the time of the injury, Dancer was alone on the hydro mobile scaffolding and was the only one to face the risk. This cannot meet the significant number requirement. *Id*. The simple fact is that, prior to Dancer moving the planking, the danger could not exist because other people used the planking. A review of the picture of the risk drawn by plaintiffs' expert contained above demonstrates that it would have been physically impossible for someone to stand on that unsupported planking without falling through:

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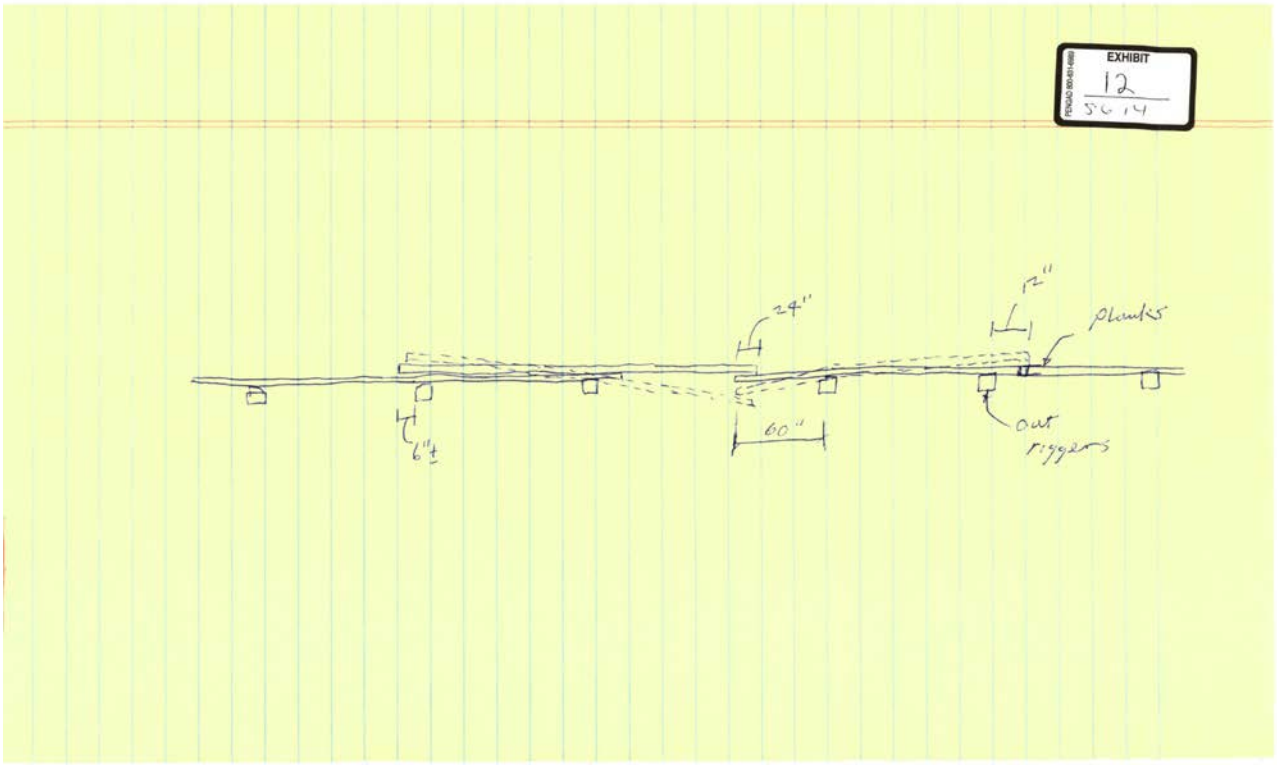

Not only were there no other falls that day, it is undisputed that there had never been any other falls on the project. Therefore, no one had faced the same risk before Dancer's fall. After the fall, no one would ever face this same risk again because the boards fell down with Dancer. (Johnson Dep, Appendix 8, p 28) Thus, the next person on the hydro mobile scaffolding would not face the improperly placed planking because the planking was gone. Further, they could use the fall arrest system that was on the hydro mobile scaffolding at the time of the fall. The scaffolding would have also been inspected by a competent person before the use the next day to find any hazard before use. (Johnson Dep, Appendix 8, pp 35-37, 61, 81, 123-124; Martin Dep, Appendix 10, pp 3, 12, 25; Stewart Dep, Appendix 11, pp 22-23, 25, 45) The same is true for the next person raising the hydro mobile, who could use the available fall protection harness and lanyard if any boards needed to be moved for the raising. Thus, no one else could face this same risk

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This Court has ruled that six workers were not a significant number:

> The Court of Appeals erred by holding that the common-work-area doctrine applies to this case. The risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff, and therefore there was not a high degree of risk to a significant number of workers. [*Alderman v JC Dev Cmtys, LLC*, 486 Mich 906; 780 NW2d 840 (2010).[8]]

Dancer facing the risk he created by himself alone cannot possibly meet the significant number requirement. The Court of Appeals erred as a matter of law and should be reversed.

IV. PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT WITH REGARD TO THE COMMON WORK AREA DOCTRINE'S FOURTH ELEMENT OF A COMMON WORK AREA

The final element of the common work area doctrine is that the claimed injury must occur in a common work area. *Ormsby*, 471 Mich at 57. Generally, a common work area exists where two or more trades work in the same area. This Court has recognized that, in a common work area where multiple trades are working, an individual subcontractor may not have the authority to rectify a safety hazard on its own:

> "[A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * * [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so." *Alber v Owens*, 66 Cal 2d 790; 59 Cal Rptr 117, 121-122; 427 P2d 781 (1967). [*Funk*, 392 Mich at 104.]

Under this precedent, this Court created the narrow exception to nonliablity because, in

[8] In fact, this Court has denied leave in a case in which the Court of Appeals concluded that 15 individuals were not considered a significant number. *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), lv den 477 Mich 1116 (2007) (Appendix 21). Although this is not binding precedent, it helps to demonstrate what this Court has thought to be a significant number in the past. Even cobbling together everyone who had been on the scaffolding at some time, the

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areas where multiple trades are working at the same time, the work may fall under the adage that when everyone is in charge, no one is in charge as none of the individual multiple subcontractors would have the authority or the ability to enforce all of the necessary safety measures. In such circumstances, because the general contractor oversees the multiple trades, it would be the only party with the ability to properly enforce safety requirements on everyone working in the area. This is a reasonable and laudable goal. But the Court of Appeals majority lost sight of this purpose in this case, unnecessarily expanding the narrow exception to an extent and a case where it just does not belong.

This case does not present a situation where no subcontractor would be able to individually "rectify the situation themselves." *Id.* Instead, ***it is undisputed that Liedal & Hart was in complete control of the hydro mobile scaffolding***. Liedal & Hart owned, erected, and maintained the hydro mobile. (Kyewski Dep, Appendix 7, pp 27-28; Johnson Dep, Appendix 8 p 52) Liedal & Hart had two competent persons on the project to inspect the scaffolding each day, Nick Martin, the job foreman, and Mike Wiejach, a certified scaffold erector. (Martin Dep, Appendix 10, pp 12, 25; Stewart Dep, Appendix 11, p 45) John Stewart of MIOSHA testified that it was not the responsibility of either BBC or Clark to employ a competent person for the project. The responsibility was Liedal & Hart's. (Stewart Dep, Appendix 11, pp 18-21) Liedal & Hart were the experts in scaffolding erection and raising and lowering the hydro mobile. (Kelly Dep, Appendix 13, p 134; Clark Dep, Appendix 4, pp 46-47, 50) ***Simply, Liedal & Hart were in complete control of the hydro mobile scaffolding***. In fact, Nick Martin, Liedal & Hart's foreman, testified that ***other trades had to ask permission of Liedal & Hart before they could ever come on the hydro mobile***:

Court of Appeals majority could only find 15 workers, which is not a significant number,

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Q (BY MR. DAVIDSON) And if any other trade wanted to use your scaffold they would have to get permission from you?
A Absolutely. [Martin Dep, Appendix 10, p 118.]

The responsibility for safety on the hydro mobile is most efficiently placed on the owner, operator, and expert in the use of that hydro mobile. This is especially true given that Liedal & Hart was in completely control of who could use the hydro mobile and when they could use it. Because this is a situation where one subcontractor could, and did, control any safety issues presented by the hydro mobile, ***the common work area doctrine is not applicable at all***. The Court of Appeals should be reversed simply based on the fact that the purpose of the common work area doctrine is not advanced by its application to cases such as the one at hand. The Docrine was never intended by this Court to extend as far as the Court of Appeal majority extended it in this case.

But even if the purpose of the common work area doctrine and Liedal & Hart's control of the hydro mobile scaffolding were ignored, there would still be no common work area in this case. A common work area does not include when one contractor works in isolation from others. *Ormsby*, 471 Mich at 57 n9. This case presents just such a case as Liedal & Hart were working in isolation for at least a week and at a height nearly double from when any other contractor would be on the hydro mobile.

Plaintiffs' claims that a common work area existed relies on the testimony of Koshurin, the electrical apprentice. Koshurin claimed that he and his foreman worked on the hydro mobile to run pipes/conduit and install some electrical boxes. (Koshurin Dep, Appendix 15, pp 10-11, 38) Koshurin admitted, however, that the electricians would not be on the hydro mobile once it passed 20 or 25 feet in height. (Koshurin Dep, Appendix 15, p 11) Koshurin later reiterated that the electricians were not on the hydro mobile scaffolding once it passed 20 feet in height: "Yes.

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especially since none of them faced the same risk as Dancer.

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I think 20 foot would be the highest that we were at on the scaffolding." (Koshurin Dep, Appendix 15, pp 43, 70) Koshurin admitted that the scaffolding had passed the height when the electricians would work on the hydro mobile ***a week before the fall at issue in this case***:

Q As far as you know, the only people on the scaffold on the day of the accident were the masons; correct?
A Correct.
Q Do you recall when you had last been on that scaffold before Mr. Dancer fell?
A Maybe somewhere around the area of a week.
Q So in the week or so before Dancer fell, you don't recall anybody, other than the masonry people, being on the scaffold; correct?
A Correct.

* * *

Q That scaffold, for that week before the accident, that wasn't a work area for you?
A No.
Q And you don't remember anybody else working on the scaffold?
A No. [Koshurin Dep, Appendix 15, pp 54-55.]

All of the testifying witnesses agreed that no other contractors besides the Liedal & Hart masons used the hydro mobile scaffolding once it reached a height of 20 feet. (Schaibly Dep, Appendix 12, pp 137-138; Allen Dep, Appendix 14, pp 6, 17-18; Waterman Dep, Appendix 16, p 102-103) Others testified that other contractors did not even use the scaffolding in its location at the time of the loss, but had only used it before it was moved to that area. (Allen Dep, Appendix 14, pp 28, 57) Therefore, in the light most favorable to the plaintiffs, the hydro mobile scaffolding had been used solely by one trade for at least a week. (Koshurin Dep, Appendix 15, pp 54-55) Moreover, the hydro mobile was not in the same position and setup as when Koshurin used it. The hydro mobile was at approximately 40 feet at the time of Dancer's fall while other trades stopped using it around 20 feet. (Complaint, Appendix 2, ¶ 12; Koshurin Dep, Appendix 15, 43, 70-71) Simply, the only reasons that any other trades would access the hydro mobile scaffolding is to access the wall to install conduits and piping. But this would only be necessary at the lower levels. As the walls grew in height over time, there would be no need to access the

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hydro mobile by anyone other than Liedal & Hart, the masonry contractors. ***For at least a week before the fall, Liedal & Hart were by themselves on the hydro mobile at a height above which any other subcontractor would access the hydro mobile.***[9] ***Given that only one contractor was on the hydro mobile, it was not a common work area.***

What the Court of Appeals majority has essentially concluded is that, once an area becomes a common work area, it must stay a common work area throughout the project. This expansive reading of the common work area doctrine is inconsistent with the purpose of the narrow exception created in *Funk*. *Funk*, 392 Mich at 104. And it has been rejected by other courts that have been called on to address the issue: "it is not true that a location always remains a common work area. Even if there is an obvious danger in a particular location, there becomes a point at which there is no longer a 'high degree of risk to a significant number of workers,' because the workers have ceased working in the common work area." *Sprague v Toll Bros*, 265 F Supp 2d 792, 800 (ED Mich, 2003).[10] In *Sprague*, at least three other trades had accessed the same roof area where the decedent was working when he fell to his death. But the evidence showed that the work of the other trades was completed prior to the fall. *Id*. Based on these facts, the Court concluded: "In short, while the greenhouse roof area may have been a 'common work area' at one time, there is no evidence to demonstrate that it was at the time of the incident." *Id*. The same reasoning applies to the case at hand. Whether or not other subcontractors worked on the hydro mobile scaffolding at lower levels and at earlier times, at the time of Dancer's fall, it is undisputed that no other trades would be working on the hydro mobile

[9] In response to Clark's application for leave to appeal, plaintiffs conceded that "for about a week, employees of one subcontractor (Dancer's employer, Liedal & Hart) used the scaffold after it had been raised above 20-25 feet." (Response Brief, p ix)

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at that height or in the relevant time period. Therefore, it could not be a common work area. *Ormby*, 471 Mich at 57 n9.

The Court of Appeals majority opinion frankly makes no sense when considering scaffolding used on work sites. Scaffolding, especially hydro mobile type scaffolding, is not static but is regularly moved all over the work site, not to mention the constant moving of them up and down from higher to lower points. The conditions are in flux and the risk faced at one time are generally completely different than the risk faced later. Under the ever-changing circumstances, they cannot be a common work area. This is especially true in this case given that the evidence shows that no other crews would work on the scaffolding once it passed 20 or 25 feet. (Schaibly Dep, Appendix 12, pp 137-138; Allen Dep, Appendix 14, pp 6, 17-18; Koshurin Dep, Appendix 15, p 11; Tammie Waterman Deposition, Appendix 16, p 102-103) At that point, there would be no need for the general contractor to be responsible for the safety on the scaffolding as there would be one contractor working in isolation from other contractors.

The Court of Appeals dissenting opinion correctly stated:

> Here, the evidence, viewed in the light most favorable to plaintiff as the nonmoving party, establishes that plaintiff was not injured in the "same" area where employees of two or more subcontractors had worked; rather, he was injured in an area where the employees of only one subcontractor, Leidal & Hart, had worked. Moreover, there is no record evidence that employees of other subcontractors would "eventually" work on the scaffold at that same elevation. Hence, plaintiff was not injured by a danger that was present in a "common" work area, see *Candelaria* [*v BC Gen Contrs Inc*], 236 Mich App at 75, and summary disposition in favor of defendants was appropriate. [Dissent, Appendix 1, p 2.]

The Court of Appeals majority should be reversed for the reasons stated by the dissent on this issue.

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[10] Again, Michigan courts have found federal precedent on point persuasive: "Though not binding on this Court, federal precedent is generally considered highly persuasive when it

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals majority should be reversed and the order of the trial court should be reinstated granting defendants summary disposition. Any costs associated with this appeal should be imposed on plaintiffs.

CERTIFICATE OF SERVICE
I hereby certify that the foregoing pleading has been electronically filed on the below listed date with the Clerk of the Court via the Electronic Case Filing system which will send notice of filing to all attorneys of record and by mailing the same in the US Mail, first class, postage prepared, to said attorneys at their addresses disclosed by the pleadings of record herein.

/s/*Laurie Wilhite*
Legal Assistant, Harvey Kruse, P.C.
DATED: February 1, 2017

Respectfully submitted,

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addresses analogous issues." *Wilcoxon*, 235 Mich App at 360 n 5.